No. 157.

W. F. Mattingly for Def'ts.

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Supreme Court of the United States

OCTOBER TERM, 1899.

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ROBERT JACKSON, PLAINTIFF IN ERROR,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

BRIEF FOR DEFENDANTS IN ERROR.

WM. F. MATTINGLY,
Attorney for Defendants.

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STATEMENT OF THE CASE.

This was an action of trespass *q. c. f.* brought by the appellant against the appellees to recover damages alleged to have been caused by the blasting of rock.

The plaintiff below, in the course of the trial before the jury, in order to avoid a verdict against him under the direction of the court, asked and obtained leave of the court to withdraw a juror and to continue the case with leave to amend his declaration within twenty days as advised (Rec., pp. 3, 4). This was done under the Act of Maryland of 1785, Ch. 80, Sec. 4, in force in this District, which is as follows:

> "The courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial; and if amendment is made after the jury is sworn, a juror shall be withdrawn; and in all

> cases where amendments are made, the adverse party shall have time allowed him, in the discretion of the court, to prepare to support his case upon the state of the proceeding so amended, *and such costs shall be allowed the party against whom such amendment may be made as the court shall think just.*"
>
> See Abert's Compilation, Ch. 55, Sec. 87, p. 460.

By a subsequent order of the court, passed two days after, plaintiff was required to pay the costs of the term in which a juror was withdrawn and leave given to amend within twenty days from that date (Rec., p. 4).

At the expiration of the twenty days, not having in any way complied with the order of the court, the plaintiff's attorney wrote to defendant's attorney that he had elected not to amend and would stand upon the original declaration (Rec., p. 5).

This letter defendants' attorney annexed to a motion to dismiss (Rec., p. 5), which the court granted (Rec., p. 6), and refused afterwards to vacate same on plaintiff's motion (Rec., p. 8).

From these orders the plaintiff appealed to the Court of Appeals, which affirmed the judgment below.

ARGUMENT.

Had the court power under the circumstances to order the dismissal of this suit? In other words, can a plaintiff, in an action at law, when in the course of the trial it becomes evident that under the rulings of the court a verdict will be directed to be given for the defendant, ask leave of the court to withdraw a juror and amend, which is granted on payment of costs, afterwards say to the court, I won't amend, I won't pay the costs, but I will risk a trial before some other judge on the original declaration. A court with-

out power to prevent such a *quasi* contempt as this, by dismissing the suit, would be without authority which it would seem it ought to possess.

While it is true that at the trial of this case, on the court being satisfied that the plaintiff, on his declaration, could not maintain his suit, it could not order that the plaintiff should be non-suited, yet it could and would have directed a verdict for the defendants.

There are numerous cases in which the court can order a suit to be dismissed. As, for instance, for failure to plead within a designated time; for not complying with order for bill of particulars; for want of prosecution; for not giving security for costs; and for failure to appear either on the regular call of the calendar or at call for trial.

Evans' Practice, 263, states:

> "*Non pros* is an entry made, or supposed to be made by order of the court, in consequence of some contempt of the court, committed by a plaintiff; either by absenting himself from the court when his presence is necessary to the progress of his cause, or by not filing a pleading, finding security for costs, or doing any other act which he has been required by a rule of the court to do."

See Perry, Com. Law Pleading, 219.
6 Enc. Pl. & Pr. 906–909, 919.

Plaintiff's refusal to comply with an order requiring him to separately paragraph his different causes of action, according to the local practice, justifies a dismissal of his case.

58 Fed. Rep. 534; Thompson *vs.* Gatlin.
See 11 Ark. 9; Town *vs.* Evans.
24 Ark. 599; Wiide *vs.* Hart.

> "A judgment of non-suit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not fol-

lowed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *nonpros'd*, and is liable to pay the costs."

16 How. 365; Homer *vs.* Brown.

The court having power to dismiss a suit for non-compliance with any order or rule passed against a plaintiff, *in invitum, a fortiori*, would have power to dismiss a suit for non-compliance with an order passed at plaintiff's request in order to avoid a verdict against him.

It is respectfully submitted that the judgment of the in court below should be affirmed.

WM. F. MATTINGLY,
Attorney for Defendants.